Supreme Court, U.S.
FILED
AUG 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-165

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1989

INEZ C. BOYD,
Petitioner,

vs.

ANGELA BLACK, THOMAS VAN AMBURG, KENNETH NELSON, and KABC TELEVISION, CAPITAL CITIES/ABC, INC.,
Respondents.

On Petition For A Writ Of Certiorari To The California Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 28.1 STATEMENT

Respondent Capital Cities/ABC, Inc., declares that it has no corporate parents or affiliates. Capital Cities/ABC, Inc. has two subsidiaries: (i) ESPN, Inc. and (ii) Practical Home Owners Publishing Company. For purposes of this declaration, "corporate parent" refers to any company that owns a majority interest in another company. "Affiliates" and "subsidiaries" refer to entities in which Capital Cities/ABC, Inc. owns a majority but not a one hundred percent interest.

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The Respondents, Angela Black, Thomas Van Amburg, Kenneth Nelson, and Capital Cities/ABC, Inc.,[1] respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the California Court of Appeal in this case.

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[1]Capital Cities/ABC, Inc., was erroneously sued herein as ABC and KABC Television.

STATEMENT OF THE CASE

Petitioner has failed to present any grounds to support review of this action. The Petition presents no novel questions of fact or law, and the decision below — that the television broadcast at issue was simply not defamatory of Petitioner, and that there was no showing of malice — was 100% correct on both the facts and the law. Accordingly, this Court should deny the Petition.

Petitioner Inez C. Boyd ("Boyd" or "Petitioner") was an activist in the California anti-drug movement, and was formerly the director of a drug treatment facility in Los Angeles called "Project Total Push: Aftercare" ("PTP").[2] On July 21, 1982, KABC-TV,[3] as part of its 5:00 p.m. "Eyewitness News" program, broadcast an investigative report (the "Broadcast"), concerning confirmed allegations that PTP was under investigation by the State Department of Alcohol and Drug Programs ("ADP"); that ADP was concerned over the results of an audit conducted of PTP; and that ADP was intending to request the Attorney General to investigate the possible misuse of public funds at PTP.[4] The Broadcast was

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[2]PTP was operated under the auspices of I-TAC (I-The American Citizen, Inc.), a non-profit, community based corporation that was founded and directed by Boyd.

[3]KABC-TV broadcasts over Channel 7 in the greater Los Angeles area.

[4]The entire transcript of the report reads as follows:

> "Angela Black: I-TAC is a state funded drug rehabilitation center. One former employee says its director, Inez Boyd, is mishandling the money. The Alcohol and Drug Program in Sacramento funds I-TAC. This year the budget was almost $58,000. That's supposed to pay a staff of four and serve 45 clients. Ron Evans says he worked for I-TAC from September of [footnote cont.]

based, among other things, upon interviews with two former employees of PTP, Ronald Evans and Cecil Miller, as well as an interview with Sarah H. Davis ("Davis"), a director of ADP. Although KABC-TV twice offered Petitioner the opportunity to be interviewed prior to the Broadcast, she refused.

On July 18, 1983, nearly one year after the Broadcast, Petitioner filed a complaint, alleging slander per se against Respondents herein, Capital Cities/ABC, Inc. ("ABC"), Angela Black ("Black"), the Broadcast re-

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1981 to February of 1982. He says his January paycheck had a stop payment put on it, and he was never paid for February either; a total loss of about $1600. And, he says, clients are not being served as claimed.

"Ron Evans: And I began to feel that it was just terribly wrong, that the public was being ripped off, that the people in the area that could resume, even use the service, were being ripped off also.

"Angela Black: I went to I-TAC offices to get their side of the story this afternoon. The Director was not in. An employee called her on a telephone. She said that she was not available for an interview today. One employee would go on camera. He said a month-long audit of I-TAC was conducted recently, but before that, the records of the clients had disappeared.

"Angela Black: How long have the records been missing?

"Cecil Miller: I don't really know. I know that they were gone when I got there. I've been here a little over a month.

Angela Black: I-TAC lost its state funds on June 30. The employees are reportedly working under contract without pay pending court hearing. Employees say they really will be sorry to see this program go, but they say they honestly don't think it will be refunded. The Alcohol and Drug Program has asked the Attorney General's office to investigate a possible misuse of funds. Angela Black, Channel 7 Eyewitness News, Southcentral Los Angeles."

porter, Thomas Van Amburg, the former station manager and Kenneth Nelson, assistant news director of KABC-TV (collectively, "Respondents").

Upon the conclusion of discovery in this action, including Petitioner's deposition, Respondents moved for summary judgment. On February 5, 1988, the trial court granted summary judgment for Respondents on each of the following grounds: (1) the Broadcast contained no defamatory statements concerning Petitioner; (2) the Broadcast was privileged under the First Amendment, because Petitioner was a "limited purpose public figure" and had failed to adduce any evidence to support a finding that Respondents acted with actual malice; and (3) the Broadcast was a privileged matter of public interest under Section 47(3) of the California Civil Code.

Petitioner filed an appeal of the trial court decision on March 10, 1988. On appeal, the California Court of Appeal specifically affirmed each of the grounds of the trial court judgment, as follows:

> [N]ot one of the alleged defamatory statements was actually made in the Broadcast .... Moreover, Boyd is a "limited purpose public figure." Consequently, any statements made without actual malice are protected by a qualified constitutional privilege under the First Amendment, ... Additionally, the broadcast addressed a matter of public interest and concern. Consequently, the broadcast was the type of communication protected by Section 47, subdivision 3, and the court properly granted the motion for summary judgment.

Court of Appeals Opinion, February 10, 1989 ("Opinion"), at Appendix A, Petition for Writ of Certiorari

("Petition"), pp. A-6 through A-11. Petitioner subsequently filed a Petition for Rehearing to the Court of Appeal on February 25, 1989, which was denied on March 3, 1989. Petitioner thereafter filed a Petition for Review to the Supreme Court of the State of California on March 21, 1989. That petition was denied on May 3, 1989.

In the instant Petition, Petitioner purports to present a single "question" for review. Nevertheless, Petitioner appears to set forth a number of different legal and factual arguments, none of which supports the relief sought:

1. That Respondents violated the fourth amendment by including allegedly "illegally obtained" information in the Broadcast;

2. That Respondents somehow "promoted" Petitioner's "public figure" image in the proceeding below; and

3. That the Court of Appeal erred in denying credence to Petitioner's allegation that Respondents "dubbed" the video tape of the Broadcast, despite the fact that Petitioner presented no evidence whatsoever to support such a theory.

Although Petitioner has argued continually throughout this action that the video tape of the Broadcast was "dubbed," she has raised the "Fourth Amendment" and "artificial public figure" issues for the first time in this Petition.[5]

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[5]The fact that Petitioner has raised these issues for the first time in this Petition is an independent ground for denial of this Petition. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2, (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

SUMMARY OF ARGUMENT

A review and writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons for review and important issues of law to be determined. Rule 17, Supreme Court Rules. Moreover, it is axiomatic that this Court limits review to questions of law, not to mere conflicts of fact or evidence. *National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U.S. 498, 503 (1951).

The instant Petition does not address any of the grounds set forth in Rule 17.1 of the Supreme Court Rules. The only conceivable grounds Petitioner might seek to assert for review are that the California Court of Appeal decision is in conflict with other state or federal court of appeal decisions, or that the decision dealt with unsettled questions of federal law or determined a federal question in conflict with a decision of this Court. *Id.*[5] Petitioner has not demonstrated, and cannot possibly demonstrate, any of the above grounds. None of the issues which appear to be presented by Petitioner set forth any question of significant import. More significantly, the California Court of Appeal determined this case as a matter of law in conformity with both federal law and applicable decisions of this Court as well as upon independent principles of state law. Petitioner has simply presented no question which necessitates review by this Court.

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[5]The other stated ground in Rule 17.1 applies to decisions of federal courts of appeals and is therefore inapplicable to this action.

REASONS WHY CERTIORARI SHOULD BE DENIED

A. There Is No Significant Question of Law Presented by Petitioner's Allegations That Respondents Obtained Information Illegally Because the Fourth Amendment Does Not Apply to Private Individuals.

Petitioner alleges, for the first time in this Petition, that Black's entrance into PTP, a public facility, constituted an illegal search and seizure under the Fourth Amendment. (Petitioner's Writ for Certiorari, pp. i, 7.). However, the prohibitions against unreasonable searches and seizures in both the federal and California constitutions apply solely to the conduct of the government and its agents, not the conduct of private individuals such as news reports. *See, U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984) ("This court has . . . consistently construed [the Fourth Amendment] protection as proscribing only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual . . . .") *citing Walter v. United States*, 447 U.S. 649 (1980); *People v. Sahagun*, 89 Cal.App.3d 1, 19, 152 Cal.Rptr. 233 (1979). Accordingly, Petitioner's first question fails to set forth any question of law, much less a significant question, which merits review by this Court.

B. The Broadcast Is Privileged Because Petitioner Is a Limited Purpose Public Figure, in Accordance With Settled Principles of Law, and the Broadcast Statements Were Made Without Malice.

Again for the first time in this action, Petitioner has concocted the theory that Respondents somehow "created" Petitioner's status as limited purpose public figure, in order to defame her and to remain within the privilege. However, contrary to Petitioner's assertions, Petitioner's

extensive, voluntary involvement in the widely publicized drug controversy in the Los Angeles area catapulted her into the public arena long before the Broadcast. As confirmed in the Court of Appeal opinion below, Petitioner was, by her own admission, "known from one end of the state to the other"; she took an active role in bringing drug treatment problems to the public's attention; she founded both I-TAC and PTP; she appeared on an NBC broadcast specifically to promote I-TAC; she founded the South East Regional Coalition to serve as the coordinator for the Alcohol and Drug Abuse Program; she had served on advisory groups for the Board of Supervisors and the Narcotics and Dangerous Drugs Commission; and, according to her testimony, "600 people . . . attended 11 weeks of seminars just to hear her expound about ideas on drug programs and funding." Opinion, at Petition pp. A-8 to A-9.

Pursuant to the foregoing facts, the Court of Appeal correctly determined that Petitioner was a limited purpose public figure, for each of the following reasons: (1) Petitioner voluntarily thrust herself into the drug treatment controversy and accompanying publicity, *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) *reh. den.* 389 U.S. 889 (1967); *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 351 (1974); (2) Petitioner involved herself in the controversy with the intent to have a major impact on the resolution of that controversy, *Tovoulareas v. Piro*, 817 F.2d 762, 773 (D.C. Cir. 1987) *cert. den. sub nom Tovoulareas v. Washington Post*, 98 L.Ed.2d 151 (1987); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297, 1298 (D.C. Cir. 1980) *cert. den.* 449 U.S. 898 (1980); and (3) the Broadcast was within the scope of and reasonably related to Petitioner's participation in the drug treatment controversy. *Harris v. Tomczak*, 94 F.R.D. 687, 704 (E.D Cal. 1982); *Waldbaum*, 627 F.2d at 1298.

The statements set forth in the Broadcast were therefore correctly determined by the Court of Appeal to be subject to a constitutional privilege under the First Amendment. *Gertz*, 418 U.S. at 342. This privilege has been extended to state court defamation actions by the Fourteenth Amendment. *Stromberg v. California*, 283 U.S. 359, 368-69 (1931).

Pursuant to this qualified privilege, Respondents may not be held liable in tort for defamation unless Petitioner can establish, upon prima facie evidence, that Respondents made their statements with actual malice. *Gertz*, 418 U.S. at 342. This Court has defined actual malice as the publication of information "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Company v. Sullivan*, 376 U.S. 254, 279-80 (1964). As a limited purpose public figure, Petitioner bears the heavy burden of proving that Respondent's Broadcast statements were made with actual malice. *See, Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1983) *reh. den.* 467 U.S. 1267 (1984). To meet this burden, Petitioner must prove with clear and convincing evidence that Respondents in fact entertained serious doubts as to the truth of the Broadcast. *Harte-Hanks Communications Inc. v. Connaughton*, 109 S.Ct. 2678, 2689 (1989).

Clearly Petitioner cannot meet this very substantial burden. Petitioner has never presented any evidence whatsoever that Respondents acted with actual malice. In fact, the Court of Appeal concluded that "respondents consulted reliable sources and obtained their information from these sources." Opinion, at Petition p. A-9.

The Court of Appeal's decision was fully supported by the record below and is in conformity with both federal and state law, as well as applicable decisions of this

Court. There is therefore no question of law which merits review by this Court.[7]

C. Petitioner's Allegation That the Video Tape of the Broadcast Was "Dubbed" Does Not Merit Review by This Court.

Petitioner alleged in her complaint below that Black stated, on camera, "[t]he State Department of Alcohol and Drug Programs would have charges of fraud filed within the next day against Boyd, citing mismanagement of public drug abuse monies at the program and [PTP's] delivery of poor health care to the client." Opinion, at Petition p. A-3.

At the hearing on Respondents' motion for summary judgment, the Court reviewed a video tape of the Broadcast, which readily confirmed that the words "fraud" or "charges" were never used. Opinion, at Petition p. A-7. In fact, Petitioner herself admitted in her deposition that she did not view the Broadcast at any time after its initial

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[7]Petitioner's reliance upon *Brown v. Kelly Broadcasting Co.*, 48 Cal.3d 711, 257 Cal.Rptr. 708, 771 P.2d 406 (1989) is wholly misplaced. *Brown* merely clarifies the scope of California's statutory public interest privilege, set forth in section 47(3) of the California Civil Code, only one of several grounds relied upon by the trial court in granting judgment for Respondents. Moreover, the Court of Appeal's determination that the Broadcast was privileged under section 47(3) is fully consistent with the *Brown* decision. Thus, the California Supreme Court determined *Brown* in April 1989, prior to its decision to deny certiorari to Petitioner's Petition for Review. The California Supreme Court obviously had notice of the *Brown* decision and correctly determined that the Court of Appeal's decision in *Boyd v. ABC* comported with *Brown*. Indeed, in footnote 24 of the *Brown* case, the California Supreme Court expressly stated that concern over the use (or misuse) of public funds might be an appropriate circumstance for application of the qualified privilege under section 47(3).

air date of July 21, 1982, until her deposition on September 3, 1987, more than five years after the complaint was filed. Opinion, at Petition p. A-7.

However, rather than admitting that her five-year old memory of the Broadcast may have been mistaken, Petitioner has now embraced the theory that the video tape must have been "dubbed" (*i.e.*, falsified). Petitioner continues to assert this theory in her Petition, regardless of the fact that she has never produced any evidence whatsoever to support her scurrilous allegations. In contrast, Respondents produced direct and uncontroverted evidence from Respondent Black, who actually reported the Broadcast, that the video tape was a true and correct copy of the Broadcast. This was confirmed by Roger Bell, the assistant news director of KABC-TV, who declared that the video tape was a true and correct copy of the Broadcast and there was "absolutely no alteration" of the tape. Opinion, at Petition p. A-4, n.4.

The question Petitioner now raises does not even approach the level of a "conflict of evidence." Rather, Petitioner is merely questioning the authenticity of evidence, an issue which is not proper to address to this Court. *National Labor Relations Board v Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) ("[The Supreme Court] is not the place to review a conflict of evidence, nor to reverse the Court of Appeals because were we in its place we would find the record tilting one way rather than the other . . . . It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony . . .") The trial court, as affirmed by the Court of Appeal, correctly determined, on the evidence before it, that there were no defamatory comments made by Respondents about Petitioner. This question, therefore, does not merit review by this Court.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court to deny the Petition for a Writ of Certiorari.

DATED: August 28, 1989

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

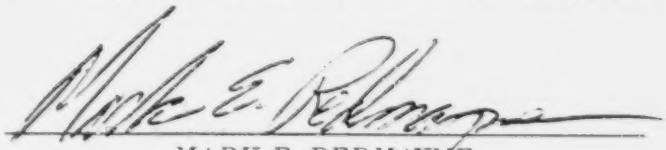
On August 25, 1989, I served the within Brief in Opposition to Petition for Writ of Certiorari in re: "Inez C. Boyd v. Angela Black, Thomas Van Amburg, Kenneth Nelson, and KABC Television, Capital Cities/ABC, Inc.," in the United States Supreme Court, October Term 1989 No. 89-165, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Inez C. Boyd
4649 Paula Way
Fair Oaks, California 95678

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 25, 1989, at Los Angeles, California



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